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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 486

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRUETT MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 95–102) is reported at 224 F. 2d 869. The findings of fact, conclusions of law, and order of the Board (R. 27–57, 63–67) are reported at 110 NLRB 856.

JURISDICTION

The judgment of the court below was entered on July 30, 1955 (R. 103). The petition for a writ of certiorari was filed on October 24, 1955, and granted on December 12, 1955 (R. 104). The jurisdiction of this Court rests on 28 U. S. C. 1254 and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether an employer who, in the course of collective bargaining negotiations, claims inability to pay a requested wage increase must, in order to fulfill the good faith bargaining requirement imposed on him by Section 8 (a) (5) of the Act, furnish the union, upon its request, with the financial data upon which the claim is based.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
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> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).
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> * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not

compel either party to agree to a proposal or require the making of a concession * * *.

STATEMENT

1. *The facts.*—In the summer of 1953, Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, A. F. L., hereafter called the Union, invoked the reopening provision of its existing contract with Truitt Manufacturing Company in order to begin negotiations with respect to a wage increase (R. 30; 1). The parties first met on August 4, and the union representatives requested that wages be raised a minimum of 10¢ an hour (R. 30; 8). Truitt's representatives refused to agree to more than a 2½¢ increase, stating "that would be all that [they] would be able to give at this time * * * that if they would give more * * * it would put them out of business or put them out of competition of getting business with other competitors" (R. 49; 8, 9). The president of Truitt, who attended the meeting, added that "the Company had never paid dividends, [was] undercapitalized, * * * didn't have working capital, and to grant more than 2½¢ at this time would simply put [it] out of business" (R. 50; 16). He further stated that to give the requested increase "would break the company up" (R. 50; 17). No agreement was reached, and the meeting ended.

On August 7 the parties met again. The Union reported that the employees had rejected the proposed 2½¢ increase, but Truitt refused to increase the offer (R. 34; 9). No further headway was made, and as a result of the impasse the Union conducted a strike, from August 10 to 17, in support of its wage demand (*ibid.*). Immediately following the strike Truitt put into effect the 2½¢ increase it had offered (R. 14). On September 2, 1953, the Union wrote Truitt that it still held the "belief [that] your Company can meet the Union's request of ten cents (10¢) per hour general increase" (R. 2). The letter further stated (*ibid.*):

> Representatives for the * * * Company have claimed, during our lengthy negotiations, the inability to grant an increase in excess of two and one-half (2½¢) cents per hour, therefore, Shopmen's Local Union No. 729 respectfully requests permission to have a certified public accountant examine such books, records, financial data, etc. to ascertain or substantiate the Company's position or claim of being unable to meet the Union's proposal. * * *

Truitt wrote in reply that it took "the position that confidential financial information concerning the affairs of this Company is not a matter of bargaining or discussing with the Union" (R. 3). It also reiterated that its refusal to grant the requested increase was based on its fear that it could not obtain work contracts "if our labor

costs used in our estimates are higher than those of our competitors" (*ibid.*).

The foregoing letters were followed by another exchange of correspondence between the parties in which each elaborated its position. Thus, in a letter to Truitt dated September 14, 1953, the Union wrote (R. 5–6):

> The Union does not contend that the financial affairs of the Company are subject to collective bargaining. It does contend, however, that the Company should submit full and complete information with respect to its financial standing and profits during the past few years in order that the Committee, as well as other members of the Union employed by the Company, can intelligently decide whether or not they should continue to press their request for a general increase of ten cents (10¢) per hour. Such financial information is pertinent to collective bargaining. Failure on the part of the Company to furnish such information has the effect of erecting an insurmountable barrier to a successful conclusion of the bargaining.
>
> * * * * *
>
> If the Company still contends that it cannot afford to grant the wage increase of ten cents (10¢) per hour requested by the Union, we respectfully request that the Company submit full and complete information and evidence of its financial status to substantiate its claim, including

> bona fide evidence as to dividends paid by the Company during the past ten (10) years and the breakdown of its manufacturing costs.

In its reply Truitt restated its position "that the financial status of the company and the information which you have requested * * * is not pertinent to this discussion and the company declines to give you such information; you have no legal right to such" (R. 7).

One further meeting between the parties was held in the fall of 1953, at which time Truitt persuaded the Union to postpone further negotiations until the early part of the following year in order to permit the Company to determine whether it would realize overhead savings from new operating procedures which it had effected (R. 40–41; 10–11). Following payment by the Company of the largest Christmas bonus it had granted in recent years (R. 26–27), the parties met on three final occasions in January and February of 1954, but no agreement was reached. Truitt offered an additional but provisional 2½¢ increase, but withdrew the offer shortly thereafter, claiming that because of "competitive business" it "just couldn't afford" more than it had already granted (R. 42; 13, 26). The Union continued to urge the full 10¢ increase, and renewed its request for "proof if the Company was not making money * * * proof to substantiate that claim" (R. 42–43; 12). By such proof, the Union stated,

it meant "any records or what have you, books, accounting sheets, cost expenditures, what not, anything to back the Company's position that they were unable to give more money" (R. 45, 46; 14–16). Truitt's representatives, however, continued to refuse the request on the ground that such records were "none of [the Union's] business" (R. 16).

2. *The Board's decision.*—Upon the foregoing facts the Board unanimously concluded that the Company had sought "to justify the refusal of a wage increase upon an economic basis," and that the Union was therefore entitled, in accordance with the good faith bargaining requirement of the Act, to be shown the records and other data upon which the Company purported to rest its claim. The Board therefore found that the Company's refusal to produce such information upon the Union's request constituted an unfair labor practice (R. 63–64).

Accordingly, the Board ordered the Company to cease and desist from refusing to bargain collectively with the Union, or from in any other manner interfering with the efforts of the Union to bargain collectively on behalf of the Company's employees; affirmatively, the Board's order requires the Company to bargain collectively with the Union, and upon request, to furnish the Union with "such statistical and other information as will substantiate the [Company's] posi-

tion of its economic inability to pay the requested wage increase" (R. 64–65).

3. *The decision of the court of appeals.*—The court below denied enforcement of the Board's order. In its view, the financial data which induces an employer to decide that he cannot afford a wage increase "relates to matters altogether in the province of management, which [are] not the proper subject of bargaining" (R. 101). The court further observed that "if the position of the Board here is sustained, it will result that every employer who resists a wage increase on economic grounds must make the concession of opening up his books and disclosing to the union not only his general financial condition, but such highly confidential matters as manufacturing costs" (*ibid.*). Accordingly, the court below concluded that the Company in this case "may not be guilty of an unfair labor practice because of refusal to furnish such information to the union" (R. 96).

SUMMARY OF ARGUMENT

The duty to bargain in good faith has been uniformly held to embrace the duty to supply information relevant to the bargaining issues. This general principle is particularly applicable in the instant case, for if employers who plead financial inability to grant a union request may withhold the information on which they rely, an employer who simply avows his financial inability can erect virtually an insurmountable barrier to

successful conclusion of the bargaining. The employer's refusal to document his bare assertion of financial inability compels the union to negotiate in the dark, unable to determine whether to adhere to, modify, or abandon its request. Conversely, requiring the production of such financial data aids the bargaining process by enabling the employees' representative to make intelligent demands commensurate with the economic realities of the situation. Experience demonstrates, as the Board and students in labor relations recognize, that production of such data furthers industrial peace and good faith negotiations, thereby accomplishing the primary purpose of the Act.

The employer in this case, who had refused to grant a union request claiming financial inability to meet it, was therefore under a duty to supply the Union, at its request, with the financial data on which the employer relied. This duty was not sufficiently met by offering to disclose the comparative wage scales of respondent and its principal competitors because the refusal of the increase was bottomed on the Company's own financial condition. Moreover, the statement that the Company could not grant the increase and still meet competition is merely an alternative way of stating the conclusion that the Company cannot afford the increase; it does not enable the Union to ascertain whether that conclusion was reached in good faith, nor does it

enable the Union intelligently to reconsider its request.

Contrary to the suggestion of the court below, there is no intimation in this case that production of the data on which the Company relies would be harmful to the Company's legitimate business interests. Moreover, the Board's order does not require the production of any specific books and records, but only such information as the Company relies on for its claim of financial inability to meet the Union's request. The Company's refusal to supply the requested information was not predicated on the claim that disclosure of the data would harm the Company and no showing to that effect was made before the Board. Hence, this case does not present any issue as to the disclosure of confidential data which might be injurious to the Company. In any event, the Board has made clear that an employer should not be required to provide information, the furnishing of which would impose an impossible or unreasonable burden upon the employer.

ARGUMENT

WHEN AN EMPLOYER REFUSES A UNION'S REQUEST FOR A WAGE INCREASE, CLAIMING FINANCIAL INABILITY TO GRANT IT, GOOD FAITH BARGAINING REQUIRES THAT HE FURNISH THE UNION, AT ITS REQUEST, THE FINANCIAL DATA ON WHICH HIS CLAIM OF INABILITY RESTS

The basic premise of the National Labor Relations Act, both before and after the 1947 amend-

ments, is that *bona fide* collective bargaining minimizes resort to strikes and other forms of industrial unrest. The theory of the statute is that the national interest is better served if the parties reach agreement by the free exchange of views in bargaining negotiations, than if one party relies on its economic power to compel the other to yield. Section 1 of the Act.

The statutory requirement of good faith bargaining has, therefore, always been understood to mean more than a mere willingness to meet at the bargaining table. As far back as *Globe Cotton Mills* v. *National Labor Relations Board,* 103 F. 2d 91, 94 (C. A. 5), it was recognized that "there is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement * * *." Similarly, in *Aluminum Ore Co.* v. *National Labor Relations Board,* 131 F. 2d 485, 487 (C. A. 7), the court recognized that the statute "contemplates exchange of information, ideas and theories in an open discussion and an honest attempt to arrive at an agreement." Accordingly, as this Court stated in *National Labor Relations Board* v. *American National Insurance Co.,* 343 U. S. 395, 402, "performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences." And, while the statute imposes no duty to reach agreement, or even to make concessions,

the duty to bargain, which it does impose, necessarily embraces the duty to furnish such relevant information as will facilitate compromise and agreement. Cf. the statement in the *American National* case that "the Act does not encourage a party [at the bargaining table] to engage in fruitless marathon discussions at the expense of *frank statement and support* of his position." 343 U. S. at 404, emphasis supplied.

Thus the courts have repeatedly recognized what Judge Magruder has termed the "presumptive relevance" of current wage rates to future bargaining,[1] and have invariably sustained the Board in holding that an employer was guilty of a refusal to bargain when he refused to supply the bargaining representative with the names, wage rates, and similar pertinent data concerning employees in the bargaining unit.[2] The rationale of these decisions is that the bargaining agent must possess adequate information on a matter at issue if it is to take a realistic position and

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[1] *Boston Herald Traveler Corp.* v. *National Labor Relations Board*, 223 F. 2d 58, 62 (C. A. 1).

[2] First Circuit: *Boston Herald, supra;* Second Circuit: *National Labor Relations Board* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947; Fourth Circuit: *National Labor Relations Board* v. *Whitin Machine Works*, 217 F. 2d 593, certiorari denied, 349 U. S. 905; Fifth Circuit: *National Labor Relations Board* v. *The Item Co.*, 220 F. 2d 956, certiorari denied, 350 U. S. 836; Sixth Circuit: *National Labor Relations Board* v. *Hekman Furniture Co.*, 207 F. 2d 561, 562; Seventh Circuit: *Aluminum Ore Co.* v. *National Labor Relations Board*, 131 F. 2d 485, 487.

fulfill its statutory function. This same principle, we submit, applies to the case at bar.

During the course of bargaining negotiations in this case, the Union requested a wage increase which respondent refused to grant on the ground that it was financially unable to meet the Union's demand. When the Union asked for the data upon which respondent predicated its claim of inability, respondent refused to produce it (*supra*, pp. 4–7). This refusal necessarily tended to force the Union to negotiate in the dark. In the circumstances, it would have been difficult for it to determine whether some other wage request on its part would meet with a similar rejection, or whether to make some alternative suggestion which would enable the Company to grant the requested increase. Indeed, the Union, without the information, was hardly in a position to determine whether the Company's claim of financial inability was even put forward in good faith. Moreover, even where the employer is acting in good faith, his refusal to document his position, and his reliance on a bare assertion of financial inability, leaves the union little room for intelligent bargaining. The union can hardly formulate and adjust its demands in the light of economic realities, and there is no real opportunity to achieve the statutory objective "of joint participation and responsibility" in the establishment of wages and other terms of the

bargaining agreement. *National Labor Relations Board* v. *Otis Elevator Co.*, 208 F. 2d 176, 179 (C. A. 2). The union is helpless even to make an informed report to its own members as to the merits of their demands; it cannot weigh the wisdom or the justice of resorting to strike action, and because it cannot intelligently appraise the picture, it is handicapped in carrying out its responsibility to inform and advise the employees whom it represents.

The statutory scheme of resolving economic disputes peacefully through collective bargaining is not served if the union is not in a position to make such a report to the employees whom it represents. For, in the absence of adequate information and explanation, the pressures are for resort to industrial warfare. As the New York State Labor Relations Board observed in a substantially identical situation (*Matter of Court Cafeteria*, 26 LRRM 1207):

> Such unsupported declarations [of financial inability to meet wage demands] gave the Union no basis upon which to evaluate Respondent's assertion or reappraise its own demands. Collective bargaining is not served, indeed it hardly exists, if assertion is resorted to when documentation is readily available.

For these reasons, the Board has held that as part of the duty to bargain collectively, the employer is "obliged to furnish the Union with

sufficient information to enable the latter to understand and discuss intelligently the issues raised by the [employer] in opposition to the Union's demands." *Southern Saddlery Co.*, 90 N. L. R. B. 1205, 1207. Indeed, as early as the first volume of Labor Board reports, the Board observed in the case of an employer who "did no more than take refuge in the assertion that [his] financial condition was poor; [and] he refused either to prove his statement, or to permit independent verification" that "This is not collective bargaining." *Pioneer Pearl Button Co.*, 1 N. L. R. B. 837, 843. And see *National Labor Relations Board* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, where the Second Circuit, speaking through Judge Chase, held that where an employer refused to grant a wage increase, claiming financial inability, the Board properly ordered the employer to "produce * * * whatever relevant information it has to indicate whether it can or cannot afford to comply with the Union's demands." 196 F. 2d at 684. Here, as in the *Jacobs* case, the employer, instead of exhibiting "a willingness to let ultimate decision follow a fair opportunity for the presentation of pertinent facts and arguments" (196 F. 2d at 683), took refuge in "the bare assertion of a conclusion [financial inability] made upon facts undisclosed and unavailable to the union * * * without a presentation of sufficient underlying facts to

show, at least, that the conclusion was reached in good faith." *Ibid.*

The holding in the *Jacobs* case, like the holding of the New York Labor Board in the *Court Cafeteria* case and the Board's holding here, proceeds from a recognition that any other result would go far to permit employers to frustrate the entire collective bargaining process which the Act seeks to foster by simply resorting to the formula of "can't afford it" for every union request advanced in bargaining negotiations. As the Board stated in the *Southern Saddlery* case, 90 N. L. R. B. at 1207: "The Respondent, by maintaining the intransigent position that it was financially unable to raise wages and, at the same time, by refusing to make any reasonable efforts to support or justify its position, erected an insurmountable barrier to successful conclusion of the bargaining."

In sum, where the employer raises the issue of his ability to pay, it seems fair and proper to require him to substantiate his claim in some manner. Sufficient data should be furnished to enable the union to bargain rationally and to fulfill its statutory function during negotiations. To allow the company to make and stand on a flat assertion without providing any information as to its basis would tend to block the whole collective bargaining process at the very outset. The question of bargaining in bad faith would not even be reached if wages were the only subject of negotiations; there could scarcely be

any bargaining at all. We submit that to permit so easy an evasion of the bargaining obligation would subvert the basic premise of the statute.

Compelling the employer to produce the data upon which he relies for his claim of financial inability to grant a union request also makes an affirmative contribution to the bargaining process. "Use of the * * * substantiating data that management has prepared will not only evidence its intent to bargain in good faith, but will make better negotiations possible." Smith, *Collective Bargaining* (Prentice-Hall, 1946), p. 49.[4] As the Union told the Company in the instant case, without this information the Union could not "intelligently decide whether or not they should continue to press their request for a general increase of ten cents per hour" (R. 5). It is well known that unions have sometimes "made some demands which were 'out of line' * * * due to a lack of information or misinformation on the part of those drafting the union proposal" * * *" Cham-

[3] See Sherman, *Employer's Obligation to Produce Data for Collective Bargaining*, 35 Minn. L. Rev. 24, 35; Daykin, *Furnishing Wage Data for Bargaining*, 4 Labor Law Journal 417, 421.

[4] A study conducted by the University of Chicago of the harmonious bargaining relationship between Studebaker Corporation and the United Automobile Workers concluded that "sharing of information as the basis for decisions" was one of three major factors which "contributed to the stability of the bargaining relationship at Studebaker." Harrison & Dubin, *Patterns of Union-Management Relations* (Science Research Associates, 1947), p. 146.

berlain, *Collective Bargaining* (McGraw-Hill, 1951), p. 89. "Failure to obtain this information may result in a union's making excessive demands based upon emotions or presumed data rather than facts." Smith, *Collective Bargaining* (Prentice-Hall, 1946), p. 38. Experience demonstrates that where the employer has shown the union that its wage demands are not reasonable in the light of actual conditions, unions may adjust their demands to the economic realities.[5] Such good faith negotiations between the parties are not likely to be achieved where an employer refuses to document its asserted financial inability to grant a union request.

That the union's possession of adequate financial data is important to successful wage negotia-

[5] In the hosiery industry "negotiations for a new agreement have become more and more a joint appraisal of a host of facts bearing upon the state of the industry and the wages that can be paid." *How Collective Bargaining Works* (Twentieth Century Fund, 1942), p. 453. In 1954 the employees of the Studebaker Corporation, upon the recommendation of their union, voted in favor of a wage decrease because of their employer's showing during bargaining negotiations that business conditions required such a cut. Daily Labor Report, 156: A4–A5 (Bureau of National Affairs, August 12, 1954). In analogous circumstances, the union representing the employees of Rice-Stix agreed to forego wage increases and other benefits to which they were entitled under an earlier agreement. 35 Labor Relations Reporter 106. See also *What Kind of Information Do Labor Unions Want in Financial Statements?*, 87 Journal of Accountancy 368, 371.

tions has been recognized not only by the Board and students in the field of labor relations,[6] but also by both organized labor and representatives of management. Labor organizations have for some years maintained research staffs to obtain and evaluate such data for the use of negotiators,[7] stating that "without the facts we cannot plan intelligently, we cannot adjust our demands to realities * * *" American Federation of Labor, *Labor's Monthly Survey*, September 1946, pp. 6–7, quoted in Chamberlain, *Collective Bargaining* (McGraw-Hill, 1951), p. 91, n. 16.[8] The same source (Chamberlain, p. 89) quotes employer representatives as recognizing the value in wage negotiations of making financial data avail-

[6] See Sherman, *op. cit., supra*, 35 Minn. L. Rev. 24, 35; Chamberlain, *Collective Bargaining Procedures* (American Council of Public Affairs, 1944), pp. 96–98; Miller, *Employer's Duty to Furnish Wage and Economic Data to Unions*, 6 Labor Law Journal 151, 160, 164, 192; *Must Management Inform Labor?*, 3 Stanford L. Rev. 88.

[7] See Pillsbury, *The Use of Corporate Financial Statements and Related Data by Organized Labor* (Indiana Business Report, No. 18) 27–30; Barkin, *Financial Statements in Collective Bargaining*, 4 Labor Law Journal 753.

[8] See also the symposium, *What Kind of Information Do Labor Unions Want in Financial Statements*, 87 Journal of Accountancy 368, 369, 371, where various union leaders emphasize the need to "have the full facts before us in our bargaining" to enable unions "to find out whether the company's claim [of financial inability] is true" and also to enable unions to make demands which "could be considered reasonable and well within the power of the company to grant."

able to the union negotiators.[9] Indeed, from the earliest days of the Wagner Act employers have in effect realized that the duty to bargain in good faith necessarily entails a duty to furnish financial data supporting a claim of inability to grant a wage demand. See, e. g., *Julius Breckwoldt & Son, Inc.*, 9 N. L. R. B. 94, 98; *Ferguson Bros. Mfg. Co.*, 9 N. L. R. B. 189, 194; for a more recent manifestation of the same attitude, see *McLean-Arkansas Lumber Co.*, 109 N. L. R. B. 1022, 1037–1038.[10]

In the instant case, to be sure, the Company submitted to the Union pay rate information as to some of its competitors and also submitted a list of jobs on which it had made unsuccessful

[9] See also Hill & Hook, *Management at the Bargaining Table* (McGraw-Hill, 1945), p. 243; *How Collective Bargaining Works* (Twentieth Century Fund, 1942), p. 453; Greenman, *Getting Along with Unions* (Harpers, 1947), p. 51; Smith, *Collective Bargaining* (Prentice-Hall, 1946), pp. 37–38, 49; Harrison & Dubin, *Patterns of Union-Management Relations* (Science Research Associates, 1947), p. 146.

[10] As stated by Harbison & Coleman, *Working Harmony* (Case Study No. 13 for the National Planning Association Committee on the Causes of Industrial Peace under Collective Bargaining), p. 38:

"Management was usually willing—and often quite anxious—to give the union the facts about the company's economic position. There was, for example, little opposition to letting the union officers look at the company's books. In effect this meant that management believed the union would act in a more responsible manner when it had all the figures on which bargaining might reasonably take place."

bids (R. 41, 43, 48; 11, 14–15, 23). But this information did not comprise the data upon which the Company rested its claim of inability to pay the requested increase. Although there is some evidence that the Company's refusal was based on its unwillingness to pay higher wages than some of its competitors, both the Trial Examiner and the Board found (R. 50, 52–53, 63–64) that the Company also took the position that it was financially unable to meet the Union's demand. This finding, not disturbed by the court below, has ample support in the record. Thus the Company president told the Union that "it would break the Company up to give up that much pay raise, and it would put them in a precarious position" (R. 17), and that "to grant more than the two and a half cents at this time would simply put them out of business" (R. 16). Other Company officials likewise told the Union that the Company "could not afford" to meet the Union's wage demand (R. 19, 10). Indeed at one stage of the negotiations the Company in effect admitted that the wage rates paid by its competitors did not control the Company's refusal to grant the increase, for it asked the Union to postpone its demand until the Company could determine whether new operating procedures were resulting in reduced overhead (*supra*, p. 6).

While the Company emphasized that it rejected the Union's wage request because to grant

it "would put them out of business or put them out of competition of getting business with other competitors" (R. 9), it persistently refused to document this conclusion, and simply restated it in varying ways. It told the Union that "the Company had never paid dividends, [was] undercapitalized, they didn't have working capital, and to grant more than the two-and-a-half cents at this time would simply put them out of business"; that it would not be able to bid successfully on jobs "if our labor costs * * * are higher than those of our competitors"; and "that profit in regard to sales and costs was low, and that the labor cost was high, and the company was struggling under a financial strain, being undercapitalized" (R. 3, 10, 16). The Union, in turn, could not intelligently bargain in this situation without an understanding of the financial data which was claimed by the Company to support its conclusion. Whether the business reasons stated by the Company were *bona fide* might well depend on what a financial report would disclose as to its "profit in regard to sales and costs," its capitalization, and its cost and price structure upon which its competitive bidding was computed. In view of the Company's attitude, this basic information had to be made available before the employees, as the Union explained to the Company, could "intelligently decide whether or not they should continue to press their request for a general increase of ten

cents (10¢) per hour" (*supra*, p. 5). Accordingly, the Company, as a prerequisite to fulfillment of its bargaining obligation, was required to grant the Union's request for "full and complete information and evidence of [the Company's] financial status to substantiate its claim" (*supra*, p. 5). This does not, of course, mean that "an employer must produce proof to establish that he is right in his business decision as to what he can, or cannot, afford to do. He is left free to decide that himself and, at the end of the bargaining, may agree only insofar as he is willing in the light of all the circumstances." *Jacobs* case, *supra*, 196 F. 2d at p. 684.

The Company's suggestion that its refusal to grant the requested increase was premised not on inability to pay but on the competitive wage situation is, as we have just noted (p. 21), contrary to the findings in this case which are supported by the record. Moreover, the distinction which the Company seeks to make does not in reality exist. To say that an increase in wages would result in an ability to bid successfully for jobs simply restates the conclusion that the increase cannot be afforded; it does not supply the data which might show that the conclusion was reached in good faith and thus might enable the Union intelligently to urge a modified request. Even if a distinction could be drawn between the economic basis of inability to pay and the economic basis of inability to bid successfully

for business, the Company could not refuse the Union the information it requested without violating the underlying principle that the "bargaining agent of the employees [is] entitled to information which would enable it to properly and understandingly perform its duties." *National Labor Relations Board* v. *Whitin Machine Works, supra,* 217 F. 2d at 594 (C. A. 4). The Company's claim that a wage increase would drive it out of the competitive market can be appraised only by an examination of profit, cost and other financial data in addition to wage levels.[11]

The observation of the court below (R. 101) that it would be harmful to the employer to require it to disclose "such highly confidential matters as manufacturing costs," is not germane to the decision in this case. The Company's refusal to supply the Union the requested information was not predicated on the claim that to divulge the data would harm the Company, and no showing to that effect was made before the Board. Significantly, none of the sources heretofore cited, including representatives of man-

[11] It is possible, as suggested by some of the Company's statements during negotiations, that high profits are necessary to create a surplus that can be turned back into the business in order to increase capitalization (*supra,* p. 3). Again, however, if this be the reason for the Company's assertion that a wage increase would adversely affect its competitive position, the parties could not intelligently proceed in their negotiations without having access to the data upon which the contention rests.

agement (see especially p. 20, n. 9, *supra*), appears to consider that revelation of the financial data on which the employer rests his bargaining position would entail a risk of disclosing confidential information. In any event, the Board has repeatedly made it clear that the Union is not necessarily entitled to the data in the specific form requested,[12] and that the duty to produce information is "subject, of course, to the qualification that an employer should not be compelled to provide information the furnishing of which would impose an impossible or unreasonable burden."[13] See also the *Jacobs* case, *supra*, where the Second Circuit observed that "The Board's order does not require the respondent to produce any specific business books and records but [merely] * * * whatever relevant information it has to indicate whether it can or cannot afford to comply with the Union's demands." 196 F. 2d at 684.

The court below likewise suggested that to require the employer to produce the data on which he relied for a claim of financial inability to grant a union demand would be to require a "'concession" contrary to the express provisions of Sec-

[12] See *Cincinnati Steel Castings Co.*, 86 N. L. R. B. 592, 593; *Old Line Life Insurance Co.*, 96 N. L. R. B. 499, 502–503, *affirmed*, 200 F. 2d 52 (C. A. 7); *McLean-Arkansas Lumber Co.*, 109 N. L. R. B. 1022, 1037–1038.

[13] *Yawman & Erbe Mfg. Co.*, 89 N. L. R. B. 881, 885 (concurring opinion), enforced, 187 F. 2d 947 (C. A. 2).

tion 8 (d) of the Act (R. 101). That provision, however, is concerned with "the substantive terms of collective bargaining agreements" (see *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395, 404, 408–409), whereas the instant case concerns not the terms of an agreement but the mechanics of the bargaining itself. An employer, even though he be acting "in good faith" (cf. R. 101), violates his bargaining obligation under the statute if he refuses to produce appropriate wage data relevant to bargaining (cases cited *supra*, p. 12, n. 2), refuses to grant unqualified recognition to the statutory bargaining representative,[14] or refused, even prior to the amended Act, to embody his agreement in writing.[15] The employer is required by statute to make these "concessions" which are a part of the mechanics of collective bargaining, although he remains free in his negotiations to refuse to make any substantive concessions as to terms of employment.

The court below observed that the Company had no duty to come to agreement with the Union, and added that it was not "appropri-

[14] *National Labor Relations Board* v. *Corsicana Cotton Mills*, 178 F. 2d 344, 346–347 (C. A. 5); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 751 (C. A. 7), certiorari denied, 313 U. S. 565.

[15] *Art Metals Const. Co.* v. *National Labor Relations Board*, 110 F. 2d 148, 150 (C. A. 2); see also *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 525–526.

ate to require the furnishing of such information * * * to those * * * who would be under no obligation to act upon the information if received" (R. 101). It is, of course, true that the Company, if it had furnished the requested data to the Union, might have remained unyielding in its opposition to the requested wage increase or that the Union might have adhered to its demands irrespective of the data. But the entire philosophy of collective bargaining presupposes that the parties will act reasonably when in possession of the facts. Thus, the Union might have retreated from its demand when acquainted with the financial data on which the Company relied, or the Union might have been able to persuade the Company that the financial picture warranted accession to the Union's wage request. It may also be true that the Company would be unwilling to grant a wage increase even if it could afford to. But the Company injected the issue of financial inability into the negotiations, and it should therefore document its assertion if bargaining is not to collapse before it is fairly begun. While the production of financial data is no guarantee that the negotiations will lead to agreement, it will at the least permit exploration of the initial obstacle thereto. It may well be true in this case, as in others, that even good faith collective bargaining will not succeed and that a resort to industrial warfare will ensue, but under the statute this should be a last resort, reached only after the

parties have in good faith explored the possibilities of agreement."[16]

In short, the employer's bald, unsupported assertion of "inability to pay" raises an "insurmountable barrier to sucessful conclusion of the bargaining" (*Southern Saddlery,* 90 N. L. R. B. 1205, 1207). The Board's order, requiring the employer to produce the information on which he relies for his claim of financial inability, is an appropriate means of removing this barrier and effectuating the national policy.

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[16] As stated in 87 Journal of Accountancy at 371–372:

"* * * even with all the basic facts available to both parties, there might still be room for a considerable difference of opinion in the interpretation of these facts. That can hardly be avoided, but there is no reason why it should constitute a barrier to ultimate peaceful agreement, if both parties negotiate in good faith. If each is persuaded of the other's sincerity and cooperativeness, differences of opinion can be resolved over the bargaining table, by compromise and a willingness to give due respect to rational arguments. If essential fundamental facts which both parties are willing to use as a basis for discussion are lacking, wage negotiations will all too often settle down into a simple test of relative strength and endurance, regardless of the actual merits of the case."

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed and the case should be remanded to the court below with directions to enforce the order of the Board.

Respectfuly submitted.

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